

**The George Mason University Instructional Foundation, Inc.  
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January 5, 2005

Ms. Marlene Dortch  
Secretary  
The Federal Communications Commission  
Washington, D.C., 20554

Dear Ms. Dortch:

**In Re: Report and Order 04-135**

I am writing to request a waiver in Subpart M of Part 27.1233 subparagraph (a) of the FCC Rules regarding who pays for new downconverters and Part 27.1233 subparagraph (b) (1) regarding who pays to provide a program track for each video or data transmission track a particular licensee is transmitting on a simultaneous basis before the transition. The Rule in these sections mentions that in a transition the Proponent(s) pays these expenses for EBS licensees. It is silent with regard to who pays BRS licensees' expenses, because earlier in the Report and Order 04-135 at Paragraph 99 on page 43 the Commission states: "To prevent a proponent(s) from incurring all of the costs associated with transitioning an MEA, we conclude that former MDS licensees must pay the costs of their own transition."

The George Mason University Instructional Foundation, Inc. (FRS 0002030708) is the licensee of C Group EBS Stations WHB 652 in Arlington, Virginia, WLX 235 in Bethesda, Maryland and WLX 728 in Shannondale, West Virginia. It is also the sole stockholder of F Corporation (FRS 0002056489) which is the licensee of BRS Station WHT 659 in Bethesda, Maryland, operating on the F Group and basically repeating the programming on the C Group.

The George Mason Foundation first began its use of the F Group with ITFS Station WHB 836 which was granted a construction permit on December 18, 1981 and became operational on May 3, 1984. On August 1, 1989, the FCC granted consent to the assignment of MMDS station WHT 659 from its original licensee and lottery winner Contemporary Communications Corp to the Foundation's F Corporation and shortly thereafter, the Foundation turned in its license for its co-channel ITFS station, WHB 836. However, the Foundation has retained, and continues to use KA 88816, its Temporary Fixed license for all four F Group EBS stations.

We created the F Corp and asked the FCC to consent to the assignment of Contemporary Communications' license to it in order to eliminate any possible co-channel interference from an ITFS and an MMDS station operating on the same frequencies in the same metropolitan area. We could have requested that the FCC consent to the assignment of the MMDS F Group to the non-profit Foundation, rather than to a separate for-profit company wholly owned by the Foundation, but we were advised at the time by our attorney that the commercial license should be held by a for profit company.

The stations have never operated from the same location. WHB 836 originally transmitted from the USA Today building and WHB 652 operated from the roof of Tower Villas condominium in

Arlington in order to reach as many receive sites as possible without line-of-site problems. Concurrent with our acquisition of the license for WHT 659, we filed an application with the FCC to move it to the River Road tower where most of the other MMDS and ITFS stations in the Washington area were co-located. We also applied to the Commission to move WHB 652 from Tower Villas to the USA Today Building again to assure that building roof tops throughout the Metropolitan area would have a clear line-of-site to one or the other. Currently 284 receive sites have antennas aimed at WHT 659; 237 receive sites look at WHB 652. We serve patrons in over 1,700 offices in these various buildings.

Programming on ITFS WHB 836 and now MMDS WHT 659 has basically always duplicated that of ITFS station WHB 652. Sometimes the F Group repeats the C Group, as when they both broadcast FCC or FERC open meetings. Other times the C Group repeats programming on the F Group. Both the F Corp and the George Mason University Instructional Foundation do business as: The Capitol Connection, George Mason University Television.

In October 2002, when the WCA-NIA-CTN Coalition submitted its "White Paper" proposal to reband the ITFS and MMDS Spectrum, footnote 10 on page 5 in Appendix B of that proposal read: "

There is at least one case in which an ITFS licensee simulcasts programming transmitted on its ITFS channels over an MDS station licensed at a different location to a wholly-owned subsidiary of the ITFS licensee. Under such circumstances, the MDS station should be considered to be an ITFS station for purposes of the transition rules (and for that purpose only).

George Mason's ITFS system is the one referred to in this footnote, and during the public comment period, no comments were made for or against this suggestion.

On August 30, 2004 I sent a letter to Messrs. Muleta and Onyeije drawing attention to the above footnote and to the fact that the FCC's Report and Order WT 04-35 ignored this footnote and in paragraph 99 on page 43 states in part, ". . . we conclude that former MDS licensees must pay the costs of their own transition." I asked that the sense of the footnote be incorporated in the final Report and Order as an *erratum* and made my letter with this request a part of the public record in this proceeding by filing it as an *ex parte* communication with commission staff. Again, there were no comments for or against the proposal. On further reflection, however, it seems like this might better be handled as a waiver request than as an *erratum*.

Section 21.19 of the Commission's Rules states that Waivers of its Rules may be granted "if the unique facts and circumstances of a particular case render the application of the Rule inequitable, unduly burdensome, or otherwise contrary to the public interest."

Though it is licensed in the BRS, WHT 659 operates not as a commercial carrier, but virtually as an EBS station that replaced a co-channel ITFS station to avoid co-channel interference. Its licensee is a wholly owned subsidiary of the non-profit George Mason University Instructional Foundation, which exists solely to benefit the outreach mission of George Mason University. To require the Foundation or its subsidiary to pay the transition costs for WHT 659, while requiring the transition Proponent(s) to pay for the Foundation's EBS transition will place an unduly burdensome financial obligation on the Foundation. It is also inequitable, since WHT 659 and

WHB 652 repeat one another's EBS eligible programming and are nearly indistinguishable from one another.

For the reasons outlined, I believe that a waiver of the Rule at 27.1233 to allow, in this instance and under these unique circumstances, a BRS station owned by an EBS licensee and basically repeating the programming carried on an EBS station to have its transition costs paid by the Proponent(s) is in the public interest and should in this case be granted.

Respectfully submitted,

/s/

Michael R. Kelley, President

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